This practice is contrary to that prescribed by the Supreme Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940). There the Court said (p. 253) that an appeal would lie, ". . . not from his order denying a new trial, for that order, save in most exceptional circumstances, is not appealable, but from the judgment entered on the verdict, for errors of law committed on the trial."

The practice now required in the First Circuit also appears to be in conflict with that in other circuits.

The exact situation as in the case at bar was involved in *DiGiovanni* v. *DiGiovannantonio*, 233 F. (2d) 26 (C.A. D.C. 1956). There the Court said (p. 28):

> "It is argued that Gabriel did not appeal from the denial of a new trial, since the notice of appeal ran literally only from the order of March 10, 1955 granting the letters of administration. We think the argument cannot be sustained. The motion was filed within 10 days of the entry of judgment; it was clearly a motion under Rule 59 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and was part of the same proceeding which produced the judgment from which Gabriel appeals. Until that motion was disposed of, the judgment lacked the finality requisite for appeal. Thus the order denying the motion for a new trial is a ruling that produced and is included within the final judgment and on appeal from that judgment properly brings the order before the reviewing Court."

The following cases show that the same practice as that in the District of Columbia is followed in other circuits:

Green v. *Reading Co.*, 180 F. (2d) 149, 150 (3 Cir. 1949):

Texas & New Orleans R.R. Co. v. *C. A. Underhill*, 234 F. (2d) 620, 623 (5 Cir. 1956).

Ford Motor Co. v. *Busam Motor Sales, Inc.*, 185 F. (2d) 531, 533 (6 Cir. 1950).

Bass v. *B. & O. Terminal R. Co.*, 142 F. (2d) 779, 780 (7 Cir. 1944).

Buder v. *Fiske*, 174 F. (2d) 260, 265 (8 Cir. 1949).

Agostino v. *Ellamar Packing Co., Inc.*, 191 F. (2d) 576, 577 (9 Cir. 1951).

Marshall's U.S. Auto Supply Co. v. *Cashman*, 111 F. (2d) 140, 141 (10 Cir. 1940).

Until the decision in the instant case the First Circuit, while permitting appeals from orders on motions for new trials in certain unusual circumstances (*Aberlin* v. *Zisman*, 244 F. (2d) 620 (1 Cir. 1957)), had recognized that the proper method of appealing from such orders was by an appeal from the judgment.

Sears v. *Pauly*, 261 F. (2d) 304, 307 (1 Cir. 1958).

It appears that, in order to permit appeals in cases where the appellant had lost the right to appeal from the judgment (*Aberlin* v. *Zisman, supra*) or had mistaken its remedy (*United States* v. *Best*, 212 F. 2d 743, 744, footnote (1 Cir. 1954); *Creedon* v. *Loring*, 249 F. (2d) 714, 717 (1 Cir. 1957)), the Court had permitted appeals from the post-judgment orders as the "final decision" in the case. The following significant language appears in the footnote to the *Best* case: "Strictly, we think, the appeal should have been taken from the original judgment of June 10, 1953, not from the order denying the motion for rehearing."

The case of *Peterman* v. *Indian Motorcycle Co.*, 216 F. (2d) 289 (1 Cir. 1954), may point the way to the result in

the instant case, but it is significant that the Court in *Sears* v. *Pauly, supra*, referred to that case as giving a choice between appealing from the judgment itself and the order denying the motion, and held that an appeal from the judgment in the *Pauly* case was properly taken.

It now seems clear that what started as an exception to the general rule in permitting appeals in hardship cases from the post-judgment motions has now become the rule in the First Circuit. Those appeals, at first permissive, have now become mandatory. The practice of appealing from the judgment is no longer a simple method of protecting a litigant's rights, but has become a trap for the unwary.

The petitioner submits that, because the ruling of the Circuit Court involves an important question of Federal Court practice and is in conflict with the practice as established by this Court, and by the Rules of Civil Procedure, and is also in conflict with the law as applied in the other circuits, the writ applied for should be granted.

2. The Court of Appeals in deciding the case has misconstrued and misapplied applicable opinions of this Court setting forth the governing principles defining the proof which requires a submission to the jury of cases under the Federal Employers' Liability Act.

Specifically, the Court below premised its decision upon a reading of Supreme Court decisions to the effect that the traditional rule that plaintiffs have the burden of persuasion in actions for negligence under the Act has been abandoned; that only the barest possibility of causation is enough to make out a case for the jury; and that only the faintest scintilla of evidence to suggest the inference of any causal connection between the negligence and the injury is sufficient (Appendix B, p. 28).

The petitioner submits that, despite occasional references in dissenting opinions of this Court to the contrary, the Court has never held that the proper test to be applied as to the sufficiency of evidence to warrant submitting a case to the jury, *i.e.*, "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought" (*Rogers* v. *Mo. Pac. R. Co.*, 352 U.S. 500, 506, 507), was in effect the equivalent of a standard under which the plaintiff may recover if he adduced only the faintest scintilla of evidence on the issue of causation. See in this respect *Brady* v. *Southern R. Co.*, 320 U.S. 476, where the Court said at page 479: "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury." In the more recent decision of *Inman* v. *B. & O. R.R. Co.*, 4 L. ed. (2d) 198, the Court, in applying the test of *Rogers* v. *Mo. Pac. R. Co.*, *supra*, to the facts of the case before it, demonstrated that the correct norm for decision did not, as the Court of Appeals claims, permit an abandonment of the rule that plaintiffs have the burden of persuasion in actions for negligence under the Act. Thus, at page 201 of its decision, the Court said: "The burden of proving that the crossing was an unsafe place to work was on petitioner." In addition the Court also uses language in the decision which militates against its acceptance as a proper rule of decision the rule that the faintest scintilla of evidence of negligence or causation is enough to take the case to the jury. Illustrative of this point are the following excerpts from the decision:

> "In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the

part of the railroad could have played no part in petitioner's injury.

. . . . . .

"In making the judicial appraisal of this tenuous proof, Ohio's Court of Appeals held it not sufficient. It found that there was 'no evidence of prior occurrences of the kind here under consideration' in the record. Indeed, unless these 11 words can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous."

See also *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576, where the Court says:

"The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged."

Thus the petitioner submits that the Court of Appeals erroneously construed the decisions of this Court in holding that the tests enunciated by it in determining the sufficiency of the evidence were tantamount to a requirement only that the barest possibility of causation be present to make out a case for the jury, and that the plaintiff is relieved of its traditional burden of proof in suits for negligence under the Federal Employers' Liability Act.

It cannot be argued that the various expressions of the Court of Appeals in its opinion, such as "barest possibility of causation," "faintest scintilla of evidence," etc., are just dicta in terms of attempted paraphrases of the proper test and that as such they did not enter into the decision, since in its opinion the Court expressly states

(Appendix B, p. 28) that it "can discern from the engineer's testimony [the testimony upon which it relies exclusively to supply evidence of negligence and causation] only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner than he did and running down the suicide, . . ."

The petitioner submits that the errors committed by the Court of Appeals are on matters of basic importance to the proper administration of the Act and could have far-reaching effects on parties litigant in Federal Employers' Liability Act cases. Many of the considerations which have persuaded this Court to grant certiorari in Federal Employers' Liability Act cases where the petitioner is the plaintiff-employee are also present in cases where the defendant-carrier is the party seeking certiorari. The zealousness of the Court to effectuate the intention of the Congress to secure the right to a jury determination where the right has been improperly denied should be matched with an equal concern on its part to safeguard all of the historical incidents of a jury trial, including the duty of the trial judge of determining whether the evidence in its entirety would rationally support a verdict for the plaintiff, assuming the jury took a view of the evidence most favorable to the plaintiff (see *Wilkerson* v. *McCarthy*, 336 U.S. 53; concurring opinion of Mr. Justice Frankfurter, 64-65), and the right of a trial judge in the exercise of his discretion to set aside a verdict and grant a new trial if it appears that a verdict, if allowed to stand, would result in a miscarriage of justice.

In those circuits which unduly relax the requirements fixed by the Court, the result could also be detrimental to plaintiff-employees. Thus cases prepared with an eye to overly liberalized norms may eventually be overturned by a higher court, where presentation actually could have

been made according to the proper test if that test had not been confused by lower federal courts.

Assuming that the Court of Appeals did make use of the proper test in determining the sufficiency of the evidence to take the case to the jury, the petitioner submits that nevertheless it improperly applied that test to the facts of the case before it.

The only scintilla of evidence of negligence suggested by the Court below is the failure of the engineer to attempt to bring his train to an emergency stop immediately upon seeing the suicide on the track 40 feet away rather than waiting until he was within about 12 feet from her. It is difficult to see any causal relation between this and the negligence relied on by the respondent in her complaint, *i.e.*, "negligently causing the train to come to a sudden and unexpected stop" (R. 3-4). These are two bases of negligence arising out of two conflicting duties. The Court below holds that the duty owed the suicide required the engineer to make an emergency stop in an attempt to avoid running over her, and felt that the engineer could be found negligent for not acting more promptly even though she first appeared on the track when the front of the locomotive was only 40 feet away from her and the locomotive could not have been stopped in emergency in less than 80 feet.

The duty which the respondent claims was violated was negligently causing the train to come to a sudden and unexpected stop.

The stopping of the train was sudden and unexpected, but that was not negligence toward the respondent in the circumstances of this case. *Herdman* v. *Penn. R. Co.*, 352 U.S. 518 (1957).

Whether the engineer had applied his brakes 40 feet from the suicide or 12 feet from her, the result of the stopping would have been the same both as to the suicide and

as to the respondent. It is the fact that the train stopped suddenly and unexpectedly that is the basis of the respondent's action, and the distance the engine was from the suicide when the brakes were applied has no causal relation to the respondent's injuries.

On the facts accepted by the Court of Appeals as the established facts of the case the conclusion cannot be reasonably drawn that negligence on the part of the railroad played any part, even so slight, in the injury of the plaintiff below. From a reading of the opinion it is clear that the Court recognizes as established the fact that, "when the suicide stepped off the platform onto the track," "the front of the locomotive was not more than 40 feet away." The Court also appears to accept as established that an emergency application of the brakes could not bring the train to a stop in less than 80 feet.* Yet on this state of the record the Court comes to the incredible conclusion that the jury might have found that an application of the brakes when the engineer first saw the suicide on the tracks, *i.e.*, 40 feet from the Diesel, somehow might have brought the train to a stop soon enough to avoid hitting the woman. It is inescapable that the Court arrives at this conclusion, albeit by a somewhat circuitous route. Thus from its consideration of the evidence the Court states that the jury was entitled to return a verdict for the plaintiff on the engineer's testimony standing alone. To support this statement, the Court finds evidence of negligence in that it could be inferred from the engineer's testimony that he did not apply the brakes as soon as he should have. The Court admits that "The engineer's testimony only tends to indicate that he might not have applied the brakes as soon as due care required and has no tendency to show by

*The Court of Appeals does not treat as negligence in and of itself the emergency application of the brakes.

a balance of probabilities, or that it was more probable than not, that an emergency application of the brakes when the suicide first stepped on the tracks could have brought the train to a stop soon enough to avoid hitting her" (R. 174). To supply that lack, however, the Court states that it can discern from the engineer's testimony a scintilla of evidence, even though it be the faintest, to suggest the inference of a causal connection between the engineer's failure to apply the brakes sooner than he did and running down the suicide. When it comes to actually demonstrating what that scintilla is, the Court never does set forth a possible factual hypothesis on which the engineer could have avoided running over the woman, but takes refuge in "recent decisions of the Supreme Court." Thus it appears that, if there is a scintilla of evidence in this case, it is a scintilla supplied by the so-called recent trend of Supreme Court decisions, not by the facts of the case.

It might be argued that implicit in the Court's decision on the facts is a rejection of the engineer's testimony as to the distance which it would take the train to stop upon an emergency application of the brakes. Thus if the train could be stopped in an emergency in 20 feet, 30 feet, or in any distance short of 40 feet, then, in the light of the other undisputed evidence, it would indeed be proper to say that there was a causal connection between the failure to apply the brakes sooner and the running over of the suicide. The only difficulty is that there is no evidence in the record on the distance required for an emergency stop other than that supplied by the engineer's testimony. So, if that testimony is rejected, then there is a complete lack of evidence on this point and for the jury to make a finding it would have to indulge in conjecture. As the Court stated in *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, 576, ". . . disbelief of the engineer's testimony would not supply a want of proof." Thus, the only credible evidence is that the train

could not be stopped in less than 80 feet. Indeed, the following language in the Court of Appeals decision seems to demonstrate that the Court is committed without qualification to acceptance of that fact. "It is true that no eye witness to the tragedy, and there were several, placed the front of the locomotive more than 40 feet away, about half the distance in which the *train could possibly be stopped*, when the suicide stepped off the platform onto the track" (R. 173-174). (Emphasis supplied.) On the state of the facts accepted by the Court of Appeals we might ask ourselves in the words of Justice Whittaker in his concurring opinion in *Inman* v. *B. & O. R.R. Co.*, cited, *supra*, "how could [the petitioner] have prevented the casualty"?

The petitioner submits that on the facts of this case there was not any substantial evidence, or even a scintilla of evidence, of negligence on the part of the petitioner that caused or directly contributed in any degree to cause the injury of the plaintiff below. Consequently the Court of Appeals clearly erred in deciding the case.

Conclusion.

For the foregoing reasons this petition for a writ of certeriorari should be granted.

Respectfully submitted,
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DAVID W. WALSH,
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Boston, Massachusetts,
February 11, 1960.

Appendix A.

United States Code (1952 Edition).

45 U.S.C. Sec. 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Rules of Civil Procedure.

Rule 50. Motion for a Directed Verdict:

(b) Reservation of decision on motion. Whenever a motion for a directed verdict made at the close of all the

evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 54. Judgments; Costs:

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Rule 58. Entry of Judgment:

Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; . . . The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Rule 59. New Trials; Amendment of Judgments:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . .

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

Rule 73. Appeal to a Court of Appeals:

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, . . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are speci-

fied in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

Appendix B.

OPINION OF COURT OF APPEALS FOR THE FIRST CIRCUIT IN NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEFENDANT, APPELLANT, v. MARY L. DONNELLY HENAGAN, PLAINTIFF, APPELLEE.

(Heard October 6, 1959; Decided November 27, 1959.)

Before Woodbury, Ch. J., and Hartigan and Aldrich, Cir. JJ.

WOODBURY, Chief Judge.

On October 11, 1954, the plaintiff-appellee was employed by the defendant-appellant as a grill-car waitress on its regularly scheduled passenger train which left Boston at 7 A.M. bound for New York. As the train, proceeding at 12 to 15 miles per hour, entered the Providence, Rhode Island, railroad station about an hour later, the engineer made an emergency application of the brakes in an unsuccessful attempt to avoid running over a woman who stepped from the station platform onto the tracks in front of the locomotive, obviously and concededly for the purpose of committing suicide.

At the time the brakes were applied the plaintiff was standing at the service counter at the forward end of the grill-car waiting for food from the kitchen. She was thrown against the counter by the sudden stop of the train

but she did not fall, although some of her fellow employees in the car lost their footing, and silverware, dishes and kitchen utensils in the car were thrown to the floor. The plaintiff immediately gave evidence of pain, principally in her shoulders and neck, and became hysterical. She was removed from the train at Providence and, with another grill-car employee who was injured, sent back to Boston and there hospitalized. No serious physical injury has ever been found by the medical men who have examined her. There is no doubt, however, that since the event of October 11, 1954, she has suffered more or less acutely from paranoid psychosis, described by her medical expert at the trial as "• • • a mental disease characterized by suspiciousness, by the presence of ideas of guilt and reference to one's self of events not connected with one's self." To quote from the same source, her belief since 1954 or 1955 has been "• • • that she herself was personally responsible for the death of the woman who fell or jumped in front of the train on which she worked in 1954, just as though she were herself a murderer," and that "• • • there was going to be a murder trial at which she herself was to be the defendant." There is ample evidence, and indeed it appears to be conceded, that because of her mental condition the plaintiff has been unable to work or care for her family since the accident and that the prospects of her eventual recovery are not very bright.

In due course the plaintiff brought suit against the defendant in the court below under the Federal Employers' Liability Act,[1] and a trial by jury resulted in a verdict for the plaintiff on which the court immediately entered judgment. The defendant within the time limited by the rules moved for judgment notwithstanding the verdict and also

1. 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1401, 45 U.S.C. § 51 et seq.

for a new trial. Hearing was held on these motions at the conclusion of which the court announced:

> "I am denying both motions. On the defendant's Motion for Directed Verdict I have endorsed this: 'This motion was presented to the Court before the case went to the jury. The Judge waved aside the motion and said it was "denied" but the denial is not meant to be final but merely meant the Judge refused to act upon it until after the jury returned its verdict. The jury having returned its verdict this Judge would grant the motion were he free to do so. But obedient to what he understands to be the views of a majority of the Supreme Court of the United States and solely in response to such command this Court denies the motion. Wyzanski, J., January 13, 1959.'
>
> "On the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, I have endorsed this as follows: 'This Motion would be granted by this Court were it free to do so, but this Court construes the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion. Wyzanski, J., January 13, 1959.'"

The court then said in elaborating its views:

> "In my opinion there was no evidence whatsoever of negligence on the part of the engineer. I cannot read the record as a whole in a way to find any evidence of negligence. But I know that my method of reading the record is different from that of a majority of the Supreme Court of the United States as exhibited in past cases, and I hope I am a lawful judge, and I recognize the limits of my authority, whether appellate judges do or not."

Furthermore, the court indicated that in its opinion the plaintiff had failed to establish causation. It said:

> "With respect to the aspect of causation I also believe that the plaintiff failed to bear the burden of proof. I do not believe that the condition which the plaintiff had even on the plaintiff's medical testimony can legitimately be said to have resulted in whole or in part from the incident which occurred at the Providence Station on the 11th of October, 1954.
>
> • • • • • •
>
> "There is no sensible medical explanation which I have ever heard that makes the onset of insanity or mental incompetence legally the result of a situation such as existed in the Providence Station, and I regard the jury as having reached a preposterous conclusion."

The defendant below did not appeal from the denial of its motions for judgment notwithstanding the verdict and for a new trial. It did, however, seasonably appeal from the judgment entered on the verdict prior to the filing of its motions. Having moved at the appropriate time for a directed verdict, it can here challenge the sufficiency of the evidence to take the plaintiff's case to the jury. And, having moved within the time fixed in the Rules for judgment notwithstanding the verdict, it can properly ask this court for remand to the court below for the entry of judgment in its favor, not merely for a new trial. Cone v. West Virginia Paper Co., 1947, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849; Johnson v. New York, N. H. & H. R. Co., 1952, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77, and cases cited.

In Rogers v. Missouri Pacific R. Co., 1957, 352 U.S. 500, 506, 507, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 the Court said

with reference to the Federal Employers' Liability Act: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." And then the Court said: "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

The test is simply and easily stated. The trouble comes in applying it, for what may be entirely reasonable to one person may be utterly unreasonable to another. The Supreme Court of the United States, of course, has the final say in these cases as to what is or is not a reasonable conclusion to draw from the evidence. And we recognize that in recent years the Supreme Court has allowed juries great latitude in deciding what may or may not be a reasonable conclusion to draw from the evidence in cases under the Federal Employers' Liability Act. We do not, however, read the Court's recent decisions as depriving trial judges in cases like this of their historic function of exercising a preliminary judgment on the facts to determine whether the plaintiff has shown enough to warrant a fair-minded jury in returning a verdict in his favor. New York, New Haven & Hartford Railroad Co. v. Dox, 1 Cir., 1957, 249 F.2d 572, 573, 574. We think trial judges still have the duty, in these cases as in others, to screen the evidence to ascertain whether it is enough to persuade reasonable minds that some negligence of the employer contributed in some way or another to the plaintiff-employee's injury. And we think the various courts of appeal still have a function to perform in reviewing the decisions of the dis-

trict courts in their respective circuits on this matter. See the Dox case supra.

But of course, these functions, trial and appellate, are to be performed with an eye to the trend indicated by recent decisions of the Supreme Court. With this trend in mind, we turn to consideration of the evidence.

Trains from Boston to New York approach the Providence railroad station from the east on a gradual curve to the right. The platform for the accommodation of passengers, which is only a matter of inches above the top of the rails, was on the right of the train as it came into the station on track No. 3. The right hand rail of track No. 3 (we refer to right and left from the point of view of the engineer of the train, who was in his seat on the right hand side of the cab near the front of the diesel locomotive), is about two feet from the edge of the platform. The rails are 4 feet 8½ inches apart and about two feet to the left of the left hand rail there is a picket fence separating track No. 3 from the next track to the south, track No. 1.

The engineer testified that he first noticed the suicide as she stepped over the rail nearer the platform and that she was then 35 or 40 feet away. He said that at first he thought she had gone onto the track to pick up some object lying between the rails and did not realize that she either could not or did not intend to step back into safety until she had proceeded in the direction of the fence to the vicinity of the further rail when she turned toward the locomotive and started to squat or kneel down and that thereupon he immediately made an emergency application of the brakes bringing the train to a stop in about 280 feet which was the shortest distance in which it could be stopped at 12 to 15 miles per hour on dry rails with brakes in proper order, as they were at the time. The suicide's body was picked up under the wheels of the train about 68 feet back of the front of the locomotive.

Plaintiff's counsel does not suggest that if the engineer first saw the suicide when she was only 35 or 40 feet away he ought to have realized that he could not then stop the train in season to avoid running over her and so in the exercise of due care toward passengers and fellow employees on the train he should have made a gentler application of the brakes. Nor does he argue that an emergency application of the brakes was negligence in and of itself. See Herdman v. Pennsylvania R. R. Co., 1957, 352 U.S. 518, 77 S.Ct. 455, 1 L.Ed.2d 508. His contention in a nut shell is that it could reasonably be found on the evidence in the record that in the exercise of due care the engineer should have seen the would-be suicide and sized up the situation sooner than he did and that had he done so, he could have brought the train to a stop without running over her.

Counsel for the plaintiff makes a rather involved argument in the attempt to show that on the evidence in the record the jury could reasonably infer that the woman was in the engineer's sight on the track an "obvious suicide" when the train was some 160 to 180 feet away so that, had the engineer acted as promptly as he should, he could have brought the train to a stop without running over the suicide and even without the necessity of an emergency application of the brakes. On analysis the argument impresses us as fallacious. We see no need to discuss it, however, for we think that the trend of recent decisions of the Supreme Court indicates that the jury was entitled to return a verdict for the plaintiff on the engineer's testimony standing alone.

It is true that no eyewitness to the tragedy, and there were several, placed the front of the locomotive more than 40 feet away, about one half the distance in which the train could possibly be stopped, when the suicide stepped off the platform onto the track. But the engineer said that he watched the suicide walk across the tracks toward the fence

believing that she could and would get off the tracks and that he did not apply the brakes until she turned toward the locomotive and started to squat or kneel. From this it could well be inferred that the engineer did not apply the brakes as soon as he should. Indeed, from the testimony that the train could be stopped in 80 feet and the testimony that the suicide's body was picked up 68 feet back of the front of the locomotive, it would appear that although the engineer first saw the suicide when she was 40 feet away he did not apply the brakes until she was only 12 feet in front of the locomotive. It is true that the engineer's testimony only tends to indicate that he might not have applied the brakes as soon as due care required and has no tendency to show by a balance of probabilities, or that it was more probable than not, that an emergency application of the brakes when the suicide first stepped on the tracks could have brought the train to a stop soon enough to avoid hitting her. But recent decisions of the Supreme Court in cases under the Federal Employer's Liability Act, indeed, the applicable rule quoted above, seem to us clearly to indicate abandonment of the traditional rule that plaintiffs have the burden of persuasion in actions for negligence, at least insofar as actions for negligence under the Act are concerned, and that only the barest possibility of causation is enough to make out a case for the jury. Thus, although we can discern from the engineer's testimony only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner than he did and running down the suicide, nevertheless, as we read recent decisions of the Supreme Court, we feel that the plaintiff has shown enough to take her case to the jury.[2]

2. See, for instance, Harris v. Pennsylvania R. Co., 80 S.Ct. 22.

As to the causal connection between the plaintiff's mental condition and the running down of the suicide, it is enough to say that the plaintiff's medical expert so testified.

The question whether the court below might properly have granted the defendant a new trial in the hope that another jury might return a verdict more in keeping with the great weight of the evidence is not before us, for the defendant did not appeal from the denial of its motion for a new trial.

Judgment will be entered affirming the judgment of the District Court.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 5511

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant, Appellant,

vs.

MARY L. DONNELLY HENAGAN, Plaintiff, Appellee.

STATEMENT OF POINTS RELIED ON BY THE APPELLANT ON APPEAL.

1. The Court erred in not allowing the Defendant's Motion for a Directed Verdict presented at the time of trial.

2. The Court erred in denying the Defendant's Motion for Judgment Notwithstanding Verdict.

3. The Court erred in denying the Defendant's Motion for a new trial.

By its Attorney,

/s/ NOEL W. DEERING

532 South Station
Boston 10, Mass.

CLERK'S CERTIFICATE

I, Roger A. Stinchfield, Clerk of the United States Court of Appeals for the First Circuit, certify that the foregoing page contains and is a true copy of the statement of points relied on by the appellant on appeal "furnished" to the Clerk of this Court under Rule 24(2) of the Rules of said Court, on July 10, 1959, in the cause in said Court numbered and entitled 5511, The New York, New Haven and Hartford Railroad Company, defendant, appellant, versus Mary L. Donnelly Henagan, plaintiff, appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Court of Appeals for the First Circuit at Boston, Massachusetts, in said First Circuit, this eleventh day of February, A. D. 1960.

ROGER A. STINCHFIELD
Clerk.

[Seal]